Supreme Court, U.S.
FILED
MAY 13 1993
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92-1924

UNITED STATES SUPREME COURT
OCTOBER 1992 TERM

JAMES CARTER,
MICHAEL BROWNWOOD,
and DREXTEL HOPKINS,

Petitioners,

vs.

HONDA MOTOR COMPANY, LTD.,
AMERICAN HONDA MOTOR CO., INC.,
and HONDA R&D CO., LTD.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the Circuit Court of Appeals erred in dismissing the Petitioners' appeal on the issue of standing when the Petitioners had standing to appeal under both Article III jurisdictional "case or controversy" principles and the "prudential considerations" established by this Court, and when that appeal presented substantial and compelling questions concerning waiver of work product and attorney client privileges by the disclosure of otherwise protected documents.

PARTIES TO PROCEEDINGS BELOW

The following persons or entities participated in the proceedings in tl United States District Court for the Western District of Arkansas and th United States Court of Appeals for the Eighth Circuit.

1) American Honda Motor Co., Inc. –
Respondent here; Appellee in Circuit Court; Defendant in District Court;

2) Brownwood, Michael – Petitioner here; Appellant in Circuit Cour Nonparty Movant in District Court;

3) Carter, James – Petitioner here; Appellant in Circuit Court; Nonparty Movant in District Court;

4) Honda Motor Co, Ltd. –
Respondent here; Appellee in Circuit Court; Defendant in District Court;

5) Honda R&D Co., Ltd. –
Respondent here; Appellee in Circuit Court; Defendant in District Court;

6) Drextel Hopkins – Petitioner here; Appellant in Circuit Court; Nonparty Movant in District Court;

7) Nelson, Paul A. –
Appellant in Circuit Court; Respondent and Attorney for Nonpar Movants in District Court;

8) Wilburn, Bonita – Plaintiff in District Court;

9) Wilburn, Leo – Plaintiff in District Court.

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Opinions or decisions rendered in this case have not been reported in either official or unofficial reporters.

JURISDICTIONAL STATEMENT

This Court's certiorari jurisdiction is invoked pursuant to Title 28, United States Code, section 1254(1), as this is a Petition on the March 11, 1993, Judgment of the United States Circuit Court of Appeals for the Eighth Circuit dismissing Petitioners' appeal for lack of standing.

STATEMENT OF THE CASE AND BASES FOR FEDERAL JURISDICTION BELOW

I. STATEMENT OF THE CASE

Petitioners here, James Carter, Drextel Hopkins, and Michael Brownwood, are the plaintiffs in three Florida diversity actions against the Respondent Honda entities, *Carter v. Honda Motor Co., Ltd.*, No. 91-574-CIV-T-23A (M.D. Fla., Tampa Div. 1991); *Hopkins v. Honda Motor Co., Ltd.*, No. 92-574-CIV-T-23A (M.D. Fla., Tampa Div. 1992); and *Brownwood v. Honda Motor Co., Ltd.*, No. 92-574-CIV-T-23A (M.D. Fla., Tampa Div. 1992). Petitioners became involved in *Wilburn v. Honda Motor Co. Ltd.*, No. 91-2175 (W.D. Ark., Ft. Smith Div. 1991), the action giving rise to this Petition, when they, through their counsel Mr. Nelson, became sigantories to a Protective Order issued by the *Wilburn* court.

On or about September 23, 1992, counsel for Honda produced a set of never-before-seen documents to plaintiff's counsel in the pending *Wilburn* action. Those documents were immediately distributed to counsel for

Petitioners, Mr. Nelson.[1] On or about September 24 or 25, 1992, after receipt of the documents, Mr. Nelson signed onto a Protective Order earlier entered by the Arkansas District Court on March 20, 1992 (hereinafter the "Initial Order"). The Agreements to be Bound by Protective Order and Consent to Jurisdiction executed by Mr. Nelson were executed on behalf of each of the individual Petitioners, *Carter*, *Brownwood*, and *Hopkins*, and will hereinafter be referred to collectively as the "Agreement."

The Initial Order stated clearly that "[t]he terms of this Order shall remain fully active until released by order of this Court . . . and this Court shall retain jurisdiction over this Order and the foregoing Stipulation for the purposes of enforcing same and adjudicating claims or breached thereof and administering damages and other remedies related thereto." Init. Ord. at ¶ 13. The Agreement executed by Mr. Nelson on behalf of Petitioners stated in part, "I agree to be bound by the terms

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[1] In addition to the two *Wilburn* plaintiffs and the three Petitioners, the documents were also disseminated to plaintiffs and their attorneys in *O'Connor v. American Honda Motor Co., Inc.*, No. 90-0897-CV-W-9 (W.D. Mo., Western Div. 1990); and *Smalley v. Honda Motor Co., Ltd.*, No. 063655 (N.Y. Sup. Ct. 1990).

of the foregoing Protective Order and to be subject to the jurisdiction of the United States District Court for the Western District of Arkansas, Fort Smith Division, for purposes of enforcement of said Protective Order."

Mr. Nelson's October 16, 1992, announcement that he planned to use the *Wilburn* documents in Petitioners' Florida actions, resulted in a flurry of motion activity in both the Arkansas and Florida district courts. In both fora, Honda claimed that the documents were protected by the attorney-client and work product privileges and that disclosure did not operate as a waiver of those privileges.

Arguing this position, Honda counsel in the *Wilburn* action sought and obtained Orders from the Arkansas district court dated October 5 and 16, each prohibiting dissemination of the subject documents. Subsequently, on October 26, 1992, Honda moved for additional relief in the form of specific enforcement of the Court's earlier Orders against Mr. Nelson.

On the afternoon of November 30, 1992, Mr. Nelson received by facsimile transmission an amended and superseding Protective Order dated November 20,

1992 (hereinafter the "Superseding Order"). The Superseding Order, entered as a direct result of the October 26 Honda Motion, required, *inter alia*, that

> 8. All persons who have received copies of any of the subject documents pursuant to the Protective Order on this case shall return to Defendants' counsel, by November 30, 1992, all copies of the subject documents, and all documents containing or describing any excerpts or information therefrom, in their possession, custody, or control.
>
> . . . .
>
> 10. There shall be no further dissemination of any of the subject documents, and no further disclosure, oral or written, of the contents of, or of information in, any of these documents, by Plaintiff, by Plaintiff's attorneys, agents, experts, or representatives, or by any other person who has received a copy of any of the subject documents pursuant to the Protective Order in this case. The contents - including names, dates, headings, and subject matter - shall not be identified by any such person in any writing, including any pleading, motion, discovery request, or other paper filed or served in litigation.
>
> 11. Each person . . . who has received a copy of any of the subject documents pursuant to the Protective Order shall provide to Defendants' counsel, by November 20, 1992, an affidavit certifying that he or she has complied with the Protective Order and stating that he or she has not provided any copy of the

> documents to anyone else. If any such person has not complied with the Protective Order, he or she shall identify each person to whom any copy has been provided.

On December 2, 1992, Mr. Nelson filed with the *Wilburn* court an Emergency Motion for Protective Order, for Rehearing on the Amended and Superseding Protective Order, and for Oral Argument, simultaneously filing similar papers with the district court in Florida. Seven days later, Honda filed a Motion for Adjudication of Contempt against Mr. Nelson in the *Wilburn* court.

The *Wilburn* court required Mr. Nelson to attend a January 7, 1993, hearing on the Emergency Motion for Protective Order, for Rehearing on the Amended and Superseding Protective Order, and on Honda's Motion for Adjudication of Contempt. There, Mr. Nelson presented lengthy argument regarding Honda's waiver of privilege in the subject documents. Ultimately, the court rejected Mr. Nelson's argument and denied his Motion. Honda's Motion for Adjudication of Contempt was also denied.

Petitioners timely appealed the district court's January 15, 1993, ruling on the waiver of privileges to the United States Court of Appeals for the Eighth Circuit,

which appeal was docketed on February 1, 1993. In response, on February 23, 1993, Honda filed an untimely Motion to Dismiss for Lack of Standing to Appeal. Therein, Honda argued that pursuant to Federal Rule of Civil Procedure 3(c) and the "prudential considerations" enunciated by this Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982), the appeal should be dismissed for Petitioners' failure to intervene as had occurred in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam). Honda also requested that "[i]f the Court should conclude that a jurisdictional lack of standing is also presented by this motion . . . the Court find good cause to consider that aspect or that the Court consider that aspect on the Court's own motion, under Rule 47A(b) of the Eighth Circuit."

On March 11, 1993, the appeal was dismissed pursuant to Eighth Circuit Rule 47A. This timely Petition for Writ of Certiorari follows.

II. BASES FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The *Wilburn* action was a products liability action alleging damages in excess of $50,000.00 brought by citizens and residents of the State of Arkansas against Honda Motor Co., Ltd., a Japanese corporation, Honda R&D Co., Ltd., a Japanese Corporation, and American Honda Motor Co., Inc., a California corporation. The diversity jurisdiction of the Arkansas district court was thus properly invoked pursuant to Title 28, United States Code, section 1332.

Petitioners, who each bring their own diversity actions against Honda in a Florida district court, came under the jurisdiction of the Arkansas district court primarily by virtue of their written consent thereto, but also by virtue of the inherent power of any court to enforce the terms of its own orders.

ARGUMENT

I. **The Circuit Court of Appeals erred in dismissing the Petitioners' appeal on the issue of standing when the Petitioners had standing to appeal under both Article III jurisdictional "case or controversy" principles and the "prudential considerations" established by this Court, and when that appeal presented substantial and compelling questions concerning waiver of work product and attorney client privileges by the disclosure of otherwise protected documents.**

A. Preliminary Issues

In the introductory section of its Motion to Dismiss, Honda stated, "t]he lack of standing here is not a jurisdictional 'case or controversy' lack of standing, but . . . lack of standing based on . . . 'prudential considerations,' as a result of Petitioners' failure to intervene in the district court.[2]

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2 Honda's only arguments were based on these prudential considerations; no arguments were made based on a jurisdictional lack of standing.

After conceding this point, however, Honda requested that if the circuit court should conclude *sua sponte* that a jurisdictional lack of standing was also presented, that the court consider that issue on its own motion.

It can be properly inferred that the circuit court dismissed the appeal based on Honda's arguments on the prudential considerations;[3] Petitioners maintain that dismissal was improper under either the prudential considerations or jurisdictional standing, however, and so present arguments here on both bases.

Finally, as previously noted, this appeal was dismissed pursuant to Eighth Circuit Rule 47A.[4] The Rule, entitled "Summary Disposition," states in subsection (b),

> [t]he appellee may file a motion to dismiss a docketed appeal on the ground that the appeal is not within the court's jurisdiction. *Except for good*

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[3] *See infra* note 4.

[4] Eighth Circuit Rule 47A provides for summary disposition on motion of the court in subsection (a) and, as here, on motion of parties in subsection (b). Though the court did not cite to either particular subsection, it is evident that the court dismissed pursuant to subsection (b), since it expressly dismissed based upon Honda's motion.

> *cause* or on the motion of court, a motion to dismiss based on jurisdiction *shall be filed within 15 days* after the court has docketed the appeal.

8TH CIR. R. 47A(b) (emphasis supplied).

This appeal was docketed on February 1, 1993. Honda's Motion to Dismiss was not filed until February 23, 1993 – 22 days after docketing and seven days outside the time allowed by the Rule. Further, Honda made absolutely no showing of good cause[5] for this tardy filing, nor did the court indicate that it had found such good cause. Thus, by the plain terms of the Rule, the court should not have granted the motion.

B. Jurisdictional Standing is Clearly Present

As stated earlier, Honda effectively conceded that Article III case or controversy standing was not implicated in this appeal. In the face of well-settled principles of law it would be difficult to argue otherwise.

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[5] In fact the only mention of the good cause requirement was Honda's request that "the court find good cause" to consider Article III case or controversy jurisdictional standing. Honda made no mention – much less a showing – of good cause in its argument on Petitioner's claimed lack of standing based on the "prudential considerations."

Article III case or controversy standing is conferred when, as here, a litigant alleges an "injury in fact" or a "distinct and palpable injury" causally related to the challenged conduct. *See generally Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970). The doctrine requires that the litigant have a personal stake in the outcome of a matter that is sufficient to assure the concrete adverseness that serves to define issues. *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

In addition to injury in fact, the litigant must demonstrate that the relief sought will prevent or redress his injury. As this Court stated in *Simon* ,

> [w]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation.

426 U.S. at 38.

Petitioners are each prosecuting actions against Honda in the United States District Court for the Middle District of Florida.[6] Upon receipt of the subject documents, counsel for Petitioners instantly recognized the critical worth of the documents to prove without question the fraud claims, conspiracy claims, and entitlement to punitive damages that had been pleaded in the Petitioners' cases; these documents were the finishing pieces to a puzzle that had remained long unfinished. What was before only speculation became documented truth, therefore it was crucial that possession of these documents be retained. If compelled by the Arkansas court to return the documents, Petitioner's counsel understood that they would never be seen again.

Honda argued that the subject documents could be sought by Carter, Brownwood, and Hopkins simply by filing appropriate discovery requests in their own actions – albeit with the aid of motions to compel "if Honda

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6 *Carter v. Honda Motor Co., Ltd.*, No. 91-574-CIV-T-23A (M.D. Fla., Tampa Div. 1991); *Hopkins v. Honda Motor Co., Ltd.*, No. 92-574-CIV-T-23A (M.D. Fla., Tampa Div. 1992); and *Brownwood v. Honda Motor Co., Ltd.*, No. 92-574-CIV-T-23A (M.D. Fla., Tampa Div. 1992).

reasserts the attorney-client privilege and attorney-work-product immunity." This argument is specious.

In the context of the *Wilburn* action, the Petitioners assert that the subject documents have lost their privileged nature by virtue of Honda's affirmative disclosure and the relatively wide dissemination that occurred. As a result, the documents were not privileged, and were thus discoverable. In fact, the documents *had already been obtained* by Petitioners and other plaintiffs. In *Carter, Brownwood* and *Hopkins* on the other hand, Petitioners did not possess the documents, the documents retained their privileged character, and the documents are not subject to discovery.[7] That the Petitioners might be able to *request* these documents in their own actions is of absolutely no import. They could request anything; it is only what they are entitled to receive that actually matters.

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[7] Petitioners attempted to discover the documents in their respective actions, but the district court has denied all discovery requests directed to the documents on the basis of privilege.

C. Petitioners are Aggrieved

As the court noted in *United States v. Little Joe Trawlers, Inc.*, 780 F.2d 158 (1st Cir. 1986), the "aggrieved" factor of the standing inquiry requires that the appellant have an immediate interest such that reversal of the trial court's order on appeal would have a direct effect on the appellant. *Id.* at 161. Plainly, because Petitioners were forced by the *Wilburn* court to return critical documents already in their possession that were not obtainable elsewhere, the Petitioners are "aggrieved."[8] Further, a reversal of the trial court's order would confer a direct benefit on the Petitioners, for they would once again be able to obtain and use in their respective actions the subject *Wilburn* documents. Thus, by any definition of the word, the Petitioners are "aggrieved." Any argument to the contrary is simply incorrect.

Because Petitioners once possessed the subject documents – which documents were critical to pleading and proving key elements of their respective cases – but

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[8] In its Motion to Dismiss Honda also argued that the Petitioners "lack standing for the entirely separate reason that they are not 'aggrieved' by the judgment."

were forced to return those documents with no prospect of seeing them again in the future, the have suffered a "distinct and palpable injury" causally related to the challenged conduct that may be redressed by an appellate consideration on the merits. Petitioners thus possess Article III "case or controvery" jurisdictional standing.

D. Petitioners have the Requisite Standing Under the Prudential Considerations Enunciated by this Court

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), sets forth "the set of prudential principles that bear on the question of standing." *Valley Forge*, 454 U.S. at 474. First, the plaintiff generally must assert his own legal rights and interests, not the rights or interest of another. *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Second, courts will not hear abstract questions of wide public significance which amount only to generalized grievances. *Id.* at 475 (citing *Warth*, 422 U.S. at 499-500). Finally, the courts require that plaintiff's interest fall within the zone to be protected by the legal provision in

question. *Id.* (citing *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Certainly, Petitioners' direct appeal of an adverse ruling involving the enforcement of a protective order against them and the waiver of attorney-client and attorney-work-product privileges satisifies each of the prudential considerations enunciated by this Court.

E. Petitioners have *De Facto* Party Status

A multitude of exceptions exist to the general rule of privity to the record that allow an appeal even if the appellant is not a party of record in the lower court.[9] In fact, a large body of caselaw expressly allows a nonparty appeal where, despite a lack of formal intervention, the nonparty has become a *de facto* party.

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[9] *See, e.g., Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990) (appeal by nonparty against whom injunction had been entered);*Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352 (10th Cir. 1972) (same); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542 (9th Cir. 1989) (appeal by nonparty against whom judgment had been entered); *Overby v. United States Fidelity & Guar. Co.*, 224 F.2d 158 (5th Cir. 1955) (appeal by nonparty whose assertion of privilege was denied); *Kloster Speedsteel AD v. Crucible, Inc.*, 793 F.2d 1565 (Fed. Cir.), *cert. denied*, 479 U.S. 1034 (1986) (appeal by nonparty bound as successor or assignee).

For example, in *Securities and Exch. Comm'n v. Wencke*, 783 F.2d 829 (9th Cir.), *cert. denied*, 479 U.S. 818 (1986), the court noted that while formal intervention would have been the better practice, an appeal could still be taken where the appellant was allowed and encouraged to participate fully in the proceedings below. 783 F.2d at 834-35 (citing *In re Proceedings Before Federal Grand Jury (Conforte)*, 643 F.2d 641, 643 (9th Cir. 1981). Specifically, the court found that the equities weighed in favor of allowing the appeal, since the appellant had been haled into the district court by the same party who was contesting appellant's standing to appeal in the circuit court of appeals. *Id.* Further, the court found, the district court had acted toward the appellant as if he were an intervening party allowing and encouraging the appellant to particpate in the proceedings. The court noted that "[a]t least two circuit courts have held that if trial courts treat potential intervenors essentially as parties during proceedings, they should be treated as intervenors at the appellate level as well, even if they have not complied with the formal requirements of Rule 24." *Id.* at 835 n.7

(citing *International Marine Towing, Inc. v. Southern Leasing Partners, Ltd.*, 722 F.2d 126, 128-29 (5th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984); *In re Beef Indust. Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979); *Roach v. Churchman*, 457 1101, 1104 (8th Cir. 1972)).

Here, Petitoners had been involved in *Wilburn* for over three (3) months, from the day after the subject documents were disclosed by Honda until the January 15, 1993, hearing when the documents were ordered to be returned – the *entire* period of time the subject documents were at issue. Indeed, the appeal by the Petitioners was limited solely to the issues arising during that time period.

As in *Wencke*, Mr. Nelson and the Petitioners were haled into the Arkansas district court by Honda, the same party that now seeks to contest their standing to appeal. As in *Wencke*, the Petitioners were allowed and encouraged by the district court to present argument; in point of fact, Petitioners counsel was actually *ordered* to appear before the Arkansas court to argue the Petitioners' positions. As in *Wencke*, the district court treated

Petitioners as if they had intervened for purposes of contesting the protective orders. Clearly, then, under *Wencke* and the numerous authorities cited therein, the Petitioners have standing to bring this appeal.

In *In re Beef Indust. Antitrust Litigation*, 589 F.2d 786 (5th Cir. 1979), a case cited in *Wencke* and presenting facts strikingly similar to the present action, the nonparty chairmen of two congressional subcommittees were allowed to appeal the denial of their motion for modification of a protective order entered in the underlying antitrust action even though they had failed to intervene. In *Beef Industry* the chairmen sought documents obtained by a party litigant through discovery. *Id.* at 788. The documents were subject to a protective order that prevented disclosure, even to the chairmen exercising congressional subpoena power. *Id.* The chairmen were allowed to file motions with the district court seeking relief from the protective order, which motions were denied. *Id.* Without intervening in the district court action, the chairmen appealed the denial of

their motions. *Id.* None of the parties to the action appealed, yet the chairmen were allowed to appeal. *Id.*

Likewise in *United States v. United Fruit Co.*, 410 F.2d 553 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969), a nonparty motion to examine documents covered by a protective order was denied. *Id.* at 555. Though the nonparty never intervened in the underlying action, its appeal was permitted. *Id.*

In *Johnson v. Trueblood*, 629 F.2d 302 (3d Cir. 1980), plaintiffs' trial counsel was held to have standing to appeal an order revoking his *pro hac vice* status. *Id.* at 303. The court stated "[b]ecause the attorney is a party to the order in the most elementary sense, this case is distinguishable from the situation where the appellant is not directly bound by the order and never intervenes in the district court as a party." *Id.* Like the attorney in *Johnson*, the Petitioners are parties to the *Wilburn* Protective Orders in the "most elementary sense;" not only because they are directly bound by the Orders through counsel's signature, but also because the district

court's rulings divested them of possession of the subject documents.

In *Bank of America v. M/V Executive*, 797 F.2d 772 (9th Cir. 1986), a United States Marshall's commission on arrest and sale of a vessel was substantially reduced by the magistrate pursuant to a stipulation executed by the parties to the underlying action. *Id.* at 773. The marshall filed papers in the action and appeared before the magistrate on oral argument. *Id.* at 774. Though the marshall had failed to intervene in the district court action, his appeal was allowed, because "the equities weigh[ed] in favor of hearing the Marshall's appeal because this [was] the only avenue to obtain appellate review of the issue." *Id.* (citing *Transamerica ICS, Inc. v. M/V Hellenic Sun*, 778 F.2d 194, 195 (4th Cir. 1985)).

Similarly, the equities must weigh in favor of the Petitioners here, because the instant appeal is the only avenue available to them to obtain appellate review of the *Wilburn* court's ruling on the waiver of privilege in these critical documents. No other remedy is available to

the Petitioners than an appeal, for all district courts involved have already spoken.

As noted above, counsel signed onto the *Wilburn* Protective Orders in a representative capacity for the benefit of his clients, the Petitioners here. Thus, the Petitioners expressly assented to the jurisdiction of the Arkansas district court for all matters dealing with or arising out of the Protective Orders or their enforcement. At least with respect to the specific issues to be raised in an appeal, the Petitioners were *de facto* parties to the *Wilburn* action by virtue of counsel's signature to the Protective Orders. For Honda to require that nonparties such as the Petitioners be bound fully by the terms of the district court Protective Orders, and then to contest their ability to appeal the enforcement of those Orders would work a substantial and, indeed, anomolous injustce.

There are many other examples of *de facto* party standing that could be noted here.[10] These cases clearly

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10 *See, e.g., Kenney v. Quigg*, 820 F.2d 665 (4th Cir. 1987) (nonparty who participated in proceedings below and had substantial interest in outcome permitted to appeal despite nonintervention); *Adams v. Morton*, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979) (where nonparty appeared in action at behest of trial court, appeal allowed despite

indicate, contrary to Honda's argument, that no *requirement* of intervention exists. In fact, the single case relied upon by Honda to fabricate such a requirment, *Marino v. Ortiz*, 484 U.S. 301 (1988), states only that "[w]e think the better practice is . . . intervention." *Id.* at 304. As Professors Wright and Miller note with respect to the *Marino* case, "the Court's brief statement that intervention is the better practice should not be taken to establish an intervention requirement." 15A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3902.1 n.34 (2d ed. 1992).

Indeed, *Marino* can be distinguished easily from the present action on its facts alone. First, unlike the Petitioners who joined in the *Wilburn* protective order dispute at its inception, the police officers in *Marino* did not even attempt to participate in the action until after a settlement had been reached. *Hispanic Soc. v. New York City Police Dept.*, 806 F.2d 1147, 1152 (2d Cir. 1986), *aff'd sub nom., Marino v. Ortiz*, 484 U.S. 301 (1988). Second,

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nonintervention); *Securities and Exch. Comm'n v. Lincoln Thrift Ass'n*, 577 F.2d 600 (9th Cir. 1978) (creditors with interest in receivership permitted to appeal denial of nonparty motion despite failure to intervene).

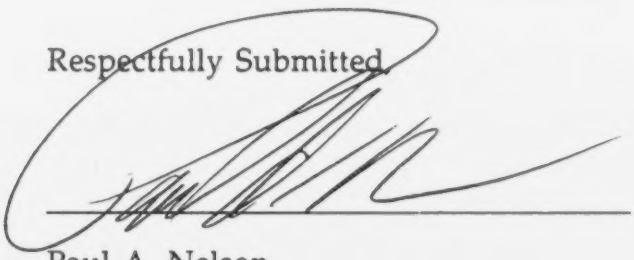
unlike the Petitioners who have a palpable interest in and need for the *Wilburn* documents, the police officers in *Marino* had no interest whatsoever in the settlement, for even if it were reversed they would not have been entitled to any relief. *Id.* Further, the facts presented by the officers on appeal were nowhere set forth in a sworn pleading in the district court action. *Id.* at 1154. In the present action, the issues to be reviewed on appeal were fully briefed and argued in the district court.

F. Conclusion

Petitioners would respectfully submit that dismissal of their appeal by the United States Circuit Court of Appeals for the Eighth Circuit was error. Under any standing analysis – whether Article III jurisdictional inquiry or examination based on the "prudential considerations set forth above – Petitioners plainly had standing to bring this appeal which presents important questions on the waiver of work product and attorney client privileges resulting from the disclosure of otherwise protected documents.

For these reasons, Petitioners respectfully request that this a Writ of Certiorari issue in this action to the United States Circuit Court of Appeals for the Eighth Circuit.

Respectfully Submitted,



Paul A. Nelson
Counsel of Record for Petitioners

APPENDIX A1

JUDGMENT OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGTH CIRCUIT DATED MARCH 11, 1993

United States Court of Appeals

FOR THE EIGHT CIRCUIT

No. 93-1268WAFS

Honda Motor Company, Ltd.; American Honda Motor Company, Inc.; Honda R&D Company, Ltd.,	*
Appellees.	*Appeal from *the United *States District *Court for the *Western *District of *Arkansas
vs.	
James Carter; Michael Brownwood, Drextel Hopkins,	*
Appellants.	*

JUDGMENT

Appellees' motion to dismiss the appeal is granted.

The court has reviewed the original file of the United States District Court for the Western District of Arkansas. The appeal is hereby dismissed. See Eight Circuit Rule 47A.

March 11, 1993

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

MANDATED ISSUED 4/1/93

APPENDIX A2

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS DATED JANUARY 15, 1993

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

BONITA L. ANDERSON WILBURN
PLAINTIFF

V. NO. 91-2175

HONDA MOTOR CO., LTD., ET AL.
DEFENDANTS

ORDER

NOW on this _____ day of January, 1993, comes on to be heard the Motion for Protective Order, Motion for Rehearing, and Motion for Oral Argument and Combined Memorandum of Law filed by Mr. Paul Nelson on behalf of non-parties; Motion for Adjudication of contempt Against Mr. Paul A. Nelson; and Motion for Protective Order and for Enforcement of Order Entered on November 20, 1992. The Court, being well and sufficiently advised, finds and orders as follows:

1. After hearing the parties on the above motions on January 7, 1993, the Court ruled from the bench as follows:

a) Mr. Nelson's Motion for Protective Order, Motion for Rehearing, and Motion for Oral Argument and Combined Memorandum of Law is denied;

b) defendant's Motion for Adjudication of Contempt against Mr. Paul A. Nelson is denied;

c) As a result of the foregoing rulings, the defendant's Motion for Protective Order and for Enforcement of Order Entered on November 20, 1992 is rendered moot.

2. Now, in order to amplify said rulings, the Court further finds and orders:

a) This Court ruled by Order dated October 5, 1992 that the disclosure by defendant of the documents in question was inadvertent and, under relevant law, defendant had not waived any privilege that may have attached to the documents. The Court continues to believe this ruling was correct and there has been no appeal therefrom. It is the Court's opinion that since Mr. Nelson signed the protective order on March 20, 1992, he proceeded to

use any documents received through this Court at his peril as long as this case was ongoing. Further, when plaintiff's counsel and Mr. Nelson first obtained the documents in question, which were then clearly stamped with indications that they were considered and claimed to be privileged documents, they were on notice, at least prior to the beginning of the trial in this case which began on September 29, 1992, that the Court might and probably would thereafter enter a ruling on the waiver of the privilege. This did, in fact, occur.

b) by Order dated November 20, 1992, the Court ruled that the documents in question are confidential, proprietary, and competitively sensitive data within the meaning of the Protective Order entered on March 20, 1992, and that they were also protected by the attorney-client privilege and attorney work-product immunity.

c) The Court is of the opinion that when Mr. Nelson received the November 20, 1992 Order, he proceeded as promptly as he could under the

circumstances to seek a ruling from this Court on his handling of the documents in question. Accordingly, the Court cannot say that Mr. Nelson's behavior to this point has been contemptuous.

d) The Court is of the opinion that the November 20, 1992 Order is clear and that it requires all documents inadvertently produced and disseminated to be returned to defendant.

e) Mr. Nelson returned the documents in question to defendants in the presence of the Court, and it was agreed upon among the attorneys present at the hearing that, upon the happening of that event, all copies of said documents had then been returned to defendants.

f) Mr. Nelson, as an officer of the Court, specifically assured the Court and the defendant that he will not attempt to use either the documents or any copies of those specific documents which were produced during the course of the Wilburn trial in any other matter, nor will he discuss their contents. These assurances were not intended to state or imply

that Mr. Nelson would not seek other copies of the original documents in question which he might properly obtain from sources other than this case now before the Court.

g) The Court further notes, without ruling on the legal ramifications involved, that nothing in the November 20, 1992 Order prohibits Mr. Nelson from attempting to obtain, through legitimate discovery means, the documents in question from any other court. His is prohibited, however, from discussing the contents thereof until such time as another court may order otherwise.

3. The Court hereby finds that by virtue of the Order entered on November 20, 1992 as well as this Order, all post-trial motions have been disposed of, and there being nothing further required of this Court, this case is hereby closed.

IT IS SO ORDERED.

JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE

APPENDIX A3

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS DATED NOVEMBER 20, 1992

IN THE UNITED STATES DISTRICT COURT FOR

THE
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

BONITA L. (ANDERSON) WILBURNVan Buren, Arkansas,	)	
Plaintiff	)	
	)	Case No. 91-2175
vs.	)	
HONDA MOTOR COMPANY, LTD. et al.,	)	
Defendants.	)	

ORDER

NOW on this _____ day of November, 1992, comes to be heard Defendant's Motion for Reconsideration and for Enforcement of Protective Order and Plaintiff's Motion for Reconsideration of Court Orders Concerning Production of Documents by Defendant on September 23, 1992 ("the motions"). The Court has considered the motions, examined in camera the documents that are the subject of the

motions, and heard the positions of the parties. Defendants agree with the Court's findings and conclusions and with the entry of this Order. While Plaintiff will not state on the record that she either agrees with the Court's findings and conclusions or with the entry of this Order, neither does Plaintiff indicate disagreement with either. Thus, the Court concludes that Plaintiff neither admits nor denies the accuracy or appropriateness of the Order and its contents. Based upon the Court's perceptions of the respective positions of the parties on this Order and its contents, the Court determines that the Order constitutes a fair, reasonable and appropriate disposition of the motions. Accordingly, the Court hereby ORDERS that the order entered in this case on October 16, 1992, be amended and replaced in its entirety by the following:

1. The seventeen documents that are the subject of the motions are confidential, proprietary, and competitively sensitive data within the meaning of the Protective Order entered on March 20, 1992, by

Judge Morris Arnold, and of the Stipulation for Entry of Protective Order incorporated therein by reference. In addition, the protective legends stamped on the documents to ensure their confidentiality and protection are the substantial and sufficient equivalent of the language specified in paragraph 3 of the Protective Order, especially because they fully satisfy the marking requirement specified in paragraph 4 (1) of the Stipulation that is incorporated by reference in the Protective Order. The documents therefore are, and were when produced in this action to Plaintiff's counsel on or about September 22, 1992, fully protected by the Protective Order.

2. The subject documents also are protected by the attorney-client privilege and the attorney work-product immunity. Defendants have at all times maintained that privilege and immunity. The disclosure of the documents to Plaintiff's counsel in this case was inadvertent, unauthorized by the privilege holder, immediately corrected by

Defendants to the maximum extent possible, and not a waiver.

3. On or before November 30, 1992, Plaintiff's counsel shall provide Defendants with a list of the names and addresses of the people to whom the subject documents were disseminated by Plaintiff, Plaintiff's counsel or other representatives, or persons who received copies from any of them, other than Plaintiff's consulting experts.

4. Plaintiff's counsel also shall provide Defendants with copies of the Protective Orders executed by all persons who received copies of the protected documents, including Plaintiff's trial experts. With respect to Plaintiff's consulting experts, Plaintiff's counsel shall obtain from each consulting expert an affidavit stating that each of Plaintiff's consulting experts has complied with the terms of the Protective Order. Plaintiff's counsel shall hold said affidavits of consulting experts in the offices of Plaintiff's counsel. Plaintiff's counsel shall provide Defendants with an affidavit stating that Plaintiff's

consulting experts have complied with the terms of the Protective Order. If any consulting expert has failed to comply with the terms of the Protective Order, his or her identity shall be disclosed to Defendants and he or she is to be considered a testifying expert for the purposes of this Order. The list, copies of the executed Protective Orders, and the affidavit shall be provided to Defendant's counsel on or before November 30, 1992.

5. The Court has returned to Defendants the copies of the documents that the Court previously had required Plaintiff's counsel to deliver to the Court.

6. Plaintiff's counsel shall return to Defendant's counsel, on or before November 30, 1992, all copies of the subject documents, and all excerpts copied therefrom, in the possession, custody, or control of Plaintiff, her counsel, or any of her agents, experts, or representatives.

7. Plaintiff's counsel immediately shall telecopy, to each person named on the list provided pursuant to paragraph 2 above, a copy of this Order.

8. All persons who have received copies of any of the subject documents pursuant to the Protective Order in this case shall return to Defendants' counsel, by November 30, 1992, all copies of the subject documents, and all documents containing or describing any excerpts or information therefrom, in their possession, custody or control.

9. Plaintiff's counsel has represented to this Court that all persons to whom they provided copies of the subject documents agreed to be bound by the Protective Order. Plaintiff's counsel shall use their best efforts to ascertain whether any additional copies, or excerpts of copies, of any of the document have been provided to any other person and, if so, to retrieve and return to Defendants all additional such copies and excerpts.

10. There shall be no further dissemination of any of the subject documents, and no further

disclosure, oral or written, of the contents of, or of information in, any of these documents, by Plaintiff, by Plaintiff's attorneys, agents, experts, or representatives, or by any other person who has received a copy of any of the subject documents pursuant to the Protective Order in this case. The contents -- including names, dates, headings, and subject matter -- shall not be identified by any such person in any writing, including any pleading, motion, discovery request, or other paper filed or served in litigation.

11. Each person (other than Plaintiff's consulting experts), who has received a copy of any of the subject documents pursuant to the Protective Order shall provide to Defendants' counsel, by November 30, 1992, an affidavit certifying that he or she has complied with the Protective Order and stating that he or she has not provided any copy of the documents to anyone else. If any such person has not complied with the Protective Order, he or she

shall identify each person to whom any copy has been provided.

12. The Plaintiffs' Supplemental Suggestions in Support of Plaintiffs' Motion for Court - Imposed Sanctions on Defendant, American Honda Motor Co., Inc., and Defendant, Honda Motor Co., Ltd., Plaintiff's Motion for Reconsideration of Court orders Concerning Production of Documents by Defendants on September 23, 1992, and Memorandum Brief in Support Thereof, Plaintiff's Amended Exhibit List, Plaintiff's Memorandum Brief in Opposition to Defendants' Oral Motion Requesting Return of Documents Produced on September 23, 1992, Plaintiff's Response to Defendants' Motion in Limine, Plaintiff's Motion for New Trial, Plaintiff's Memorandum of Law in Support of Motion for New Trial, and Court Transcripts from the two hearings held on October 7, and 13, 1992, at Defendants' request regarding the protected documents, all of which were filed or heard in this case, and all of which include a copy of the

subject documents as an exhibit, or discuss the documents in some way, together with all other documents that discuss or disclose any of the documents, shall be placed under seal so that the exhibits cannot be disclosed outside the scope of the Protective Order in this case.

13. Plaintiff's Motion for Reconsideration of Court Orders Concerning Production of Documents by Defendant on September 23, 1992 and Memorandum Brief in Support Thereof is denied.

IT IS SO ORDERED this _____ day of November, 1992.

_____

United States District Judge